Supreme Court, U. S.
FILED
SEP 10 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO: 74-1435

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents-Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
EX REL STATE WATER RESOURCES CONTROL
BOARD AND STATE OF WASHINGTON, et al.,
Petitioners-Appellees.

On Appeal From The Court of Appeals
Of The United States For The Ninth Circuit

BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA AND THE STATE OF WASHINGTON

FRANK J. KELLEY
Attorney General
State of Michigan

Robert A. Derengoski
Solicitor General

Stewart H. Freeman
Assistant Attorney General

Charles Alpert
Assistant Attorney General

Environmental Protection and
Natural Resources Division
The Law Building, Suite 630
525 West Ottawa
Lansing, Michigan 48913
(517) 373-1130

DATED: September 5, 1975

TABLE OF CONTENTS

	page
Index of Authorities	iii
Statement of the Question Involved	1
Statute Involved	2
Interest of the Amicus	3
Statement of the Case	4
Summary of the Argument	6
Argument	7
I. THE FEDERAL GOVERNMENT IS A MAJOR POLLUTER	7
II. DESPITE THE SUPREMACY DOCTRINE, CONGRESS MAY EXPRESSLY AUTHORIZE FEDERAL AGENCY COMPLIANCE WITH STATE AND LOCAL LAWS	9
III. UNDER THE CLEAN AIR ACT OF 1970 AND THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, CONGRESS HAS WAIVED THE IMMUNITY OF FEDERAL FACILITIES AND PLACED THEM ON A PAR WITH PRIVATE POLLUTERS IN TERMS OF COMPLIANCE WITH ALL STATE AND LOCAL POLLUTION CONTROL REQUIREMENTS INCLUDING PERMIT PROCEDURES	11

A. Section 118 Of The Clean Air Act of 1970 Mandates That Federal Agencies Comply With All State And Local Requirements Respecting The Control And Abatement Of Air Pollution 11

B. The Federal Water Pollution Control Act Amendments Of 1972 Also Dictates That Federal Agencies Comply With All State And Local Requirements Respecting The Control And Abatement Of Water Pollution 14

C. The Critical Statutory Phrase, "Comply With Requirements Respecting The Control And Abatement Of Pollution To The Same Extent Any Person Is Subject To Such Requirements," Should Be Interpreted To Include Compliance With State And Local Permit Procedures By Federal Agencies 16

IV. FEDERAL AGENCIES SHOULD NOT BE ALLOWED TO CIRCUMVENT THE PERMIT PROCESS WHICH IS THE FOUNDATION FOR AN EFFECTIVE STATE AND LOCAL POLLUTION CONTROL PROGRAM 18

CONCLUSION 20

FOOTNOTES 21

INDEX OF AUTHORITIES

page

CASE AUTHORITY

Balt Nat Bank v State Tax Comm
297 US 209; 80 LE 586; 56 S Ct 417 (1936) 21

Case of Proclamations
12 Rep 74 (1611) 9

Markham v Cabell
326 US 404; 90 L Ed 165; 66 S Ct 193 (1945) 18

Maun v United States
347 F 2d 970 (9th Cir, 1965) 10

Mayo v United States
319 US 441; 87 LE 1504; 63 S Ct 1137 (1943) 10

McCulloch v Maryland
4 Wheat 316 (1819) 9

Pacific Coast Dairy Inc v. Dept of Agric of Calif
318 US 285, 87 LE 761; 63 S Ct 628 (1943) 21

STATUTORY AUTHORITY

Atomic Energy Act of 1954, Section 271,
42 USC 2018 10

Clean Air Act of 1970, 42 USC 1857 et seq
— 42 USC 1857c-2 12
— 42 USC 1857c-5 12
— 42 USC 1857d-1 12
— 42 USC 1857f 13

Federal Water Pollution Control Act
Amendments of 1972, 33 USC 1251 et seq
— 33 USC 1251 (b) 14
— 33 USC 1323 .....2, 15
— 33 USC 1342(b) 14
— 33 USC 1342(c) 15

Michigan Water Resources Act, Section 7,
MCLA 323.7; MSA 3.527 15

ADMINISTRATIVE AUTHORITY

Mich Administrative Code
— 1967 AACS R 336.21 13
— 1967 AACS R 336.29 13

MISCELLANEOUS AUTHORITY

Columbia Law Review, Vol 47, 1943 17

Congressional Record, Vol 116, page 32920 (1970) .. 7

Council of Environmental Quality
— *Second Annual Report* (1971) 8
— *Fourth Annual Report* (1973)..... 19

Environment Reporter
— Vol 4, No. 22 15
— Vol 4, No. 27 15

Environmental Protection Agency, Office of Air Programs, *Real Property Owned by the Federal Government in the State of Michigan* (June, 1971) 21

General Services Administration, *Inventory Report – Real Property Leased to the United States Throughout the World*, (June 30, 1973) 21

Holmes, *Collected Legal Papers* 16

More, *Utopia* 16

The Boston Globe, January 1, 1971 11

Zwick and Benstock, *Water Wasteland*, 1971 21

STATEMENT OF THE QUESTION INVOLVED

WHETHER FEDERAL AGENCIES MUST OBTAIN AND COMPLY WITH STATE WATER POLLUTION CONTROL PERMITS AS MANDATED BY THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 SINCE CONGRESS WAIVED FEDERAL IMMUNITY AND SINCE AN EFFECTIVE NATIONWIDE POLLUTION CONTROL PROGRAM REQUIRES AN ALL ENCOMPASSING PERMIT PROGRAM?

The Federal Government, Appellee says "No."

The Court of Appeals says "Yes."

The States of California and Washington, Appellants, say "Yes."

The State of Michigan, Amicus Curiae, says "Yes."

STATUTE INVOLVED

Section 313 of the Federal Water Pollution Control Act, amendments of 1972, 86 Stat. 875, 33 U.S.C. 1323, provides as follows:

"Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption."

INTEREST OF THE AMICUS

The People of the State of Michigan comprise more than 8,875,000 residents as of the 1970 census. The area of the State of Michigan includes more than 96,720 square miles.

The State of Michigan is vitally concerned with matters of environmental quality affecting its air, land, and water and in this regard has enacted comprehensive legislation.

Federal agencies occupy 1,438 site locations throughout the State of Michigan.[1] This represents 3.4% of the annual rental of real property to the federal government in the United States.[2]

A recent survey by the Environmental Protection Agency enumerated 290 locations in Michigan that would be affected by a ruling requiring federal facilities to obtain state and local pollution permits.[3] Included in this listing are 9 major installations of more than 1,000,000 square feet.[4]

Michigan believes that federal installations within its borders are and can become significant sources of pollution which must be controlled. Consequently, Michigan views the outcome of this litigation with profound concern. We are convinced a ruling of this Court which exempts federal facilities from state and local pollution permits would have a deleterious effect on the residents and the natural resources of the State of Michigan.

The People of the State of Michigan, therefore, respectfully file this brief as an amicus curiae pursuant to Rule 42 of the Rules of this Court.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO: 74-1435

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents-Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, EX REL STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, et al.,
Petitioners-Appellees.

BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE STATE OF CALIFORNIA AND THE STATE OF WASHINGTON.

STATEMENT OF THE CASE

The Federal Water Pollution Control Act Amendments of 1972 established a program for reducing and eliminating pollutants discharged into the waters of the United States. The heart of the water quality control program was the issuance of permits, called the National Pollutant Discharge Elimination System ("NPDES"). States may obtain authority for issuing NPDES permits program after obtaining the approval of the Administrator of the Environmental Protection Agency.

The State of California submitted its proposed permit program on February 15, 1973 to the Administrator of the

Environmental Protection Agency. The Administrator approved the California plan, but exempted discharges of federal facilities on May 14, 1973.

Similarly, the State of Washington submitted its program proposal on September 14, 1973. The Washington permit program was approved by the Administrator on November 14, 1973 also with an exemption for federal facilities.

Both California and Washington filed a petition for review of the Administrator's disapproval of the States' permit program as applied to federal facilities. (October 23, 1973 and October 24, 1974 respectively.)

In an opinion issued on February 13, 1975, the United States Court of Appeals for the Ninth Circuit held that federal discharges within a state's jurisdiction must comply with state permit programs. [511 F. 2d 963 (9th Cir, 1975).] This Court subsequently granted a writ of certiorari.

It should be noted, furthermore, that this case is interrelated with the decision of the Sixth Circuit in *Kentucky v Ruckelhaus*, 497 F 2d 1172 (6th Cir, 1974), cert granted *sub nom Kentucky v Train*, No 74-220, (March 17, 1975) which involves the question of federal compliance with state and local air pollution permit requirements.

SUMMARY OF THE ARGUMENT

The federal government is a major polluter. The myriad of actual and potential pollution problems from federal facilities compels an effective response.

Reacting to the problem of federal facilities' pollution, Congress expressly waived the historic immunity granted to federal agencies from state regulation. Specifically, Congress mandated that federal facilities comply with state and local pollution control permits as if they were private persons.

This integration of federal facilities into state and local permit system recognizes the importance of a permit system to identify pollution and to adapt an effective control technology to the problem.

ARGUMENT

I.

THE FEDERAL GOVERNMENT IS A MAJOR POLLUTER.

> *". . . Federal agencies have been notoriously laggard in abating pollution . . . We cannot expect individuals and businesses to abate pollution if their government continues to pollute . . ."*
>
> — United States Senator William B. Spong, Jr. of Virginia, 116 Cong Rec 32920 (1970).

In the area of water pollution, the federal government has produced a host of pollution nightmares. Federal agencies have brought the nation "red water" (caused by an unusuable isomer of TNT), photographic processing wastes, chemical and biological warfare pollutants, aircraft washing wastes, heavy silting from road construction, pesticide and herbicide concentrations, salinity from unwarranted irrigation projects and deoxygenated water from federal dams.[5] In 1968, the Department of the Defense discharged more than 335 million gallons of human wastes per day, of which 25-30% was given less than secondary treatment.[6] Each year, the government dredges up and relocates 7 million cubic yards of polluted spoil from the Great Lakes.[7]

Cataloging federal air pollution is somewhat more elusive to detail; yet nonetheless, it is a significant problem. The lack of integration of federal air pollution sources into permit programs, undoubtedly, accounts for the inability to enumerate precisely the problem. Some information is available, however.

In its Petition for A Writ of Certiorari to this Court, the federal government noted that there are more than 1,800 major and medium installations in the Ninth Circuit alone which might be affected by a decision requiring federal installations to seek state pollution permits. (Page 8 of the Petition.) Nationwide, the problem is potentially staggering. As of 1973, there were a total of 49,008 federal installation locations.[8] While not all of these sites are sources of pollution, in particular air pollution, a significant number certainly would qualify.

Federal pollution is not illusory. Note the conclusion one study found in relation to the federal government:

> "In the face of our environmental crisis, an aroused public's natural inclination is to turn to the Federal government for help. Yet the alarming truth is that the Federal government is one of the worst polluters in the U.S. Like a huge, grimy hand, its environmental exploitation stretches from Alaska, where giant Air Force bases before their still relatively pristine surroundings, to West Point, New York, where the U.S. Military Academy dumps more than a million gallons a day of poorly treated effluent into the Hudson River."[9]

In advising the President on the state of national environment, the Council on Environmental Quality has similarly stated,

> "While progress is being made in cleaning up federal facilities, some individual facilities are still major polluters. Many of these are on military installations. As in the case of industrial pollution, management attitude is the critical ingredient in complying with environmental standards." [*2d Annual Report* of the Council of Environmental Quality (Aug. 1971)]

There can be no doubt as to the seriousness of the pollution problem at federal installations. Continued pollution at these facilities undermines the credibility of governmental efforts to abate pollution in the private sector. We submit that a major step towards restoring the government's credibility and in protecting our nation's natural resources would be to integrate federal installations into state and local pollution permit systems. Consequently, we now turn our attention to this question.

II.

DESPITE THE SUPREMACY DOCTRINE, CONGRESS MAY EXPRESSLY AUTHORIZE FEDERAL AGENCY COMPLIANCE WITH STATE AND LOCAL LAWS.

> *"The King hath no prerogative but that which the law of the land allows him."*
>
> — Coke, *Case of Proclamations* 12 Rep 74, 76 (1611).

This Court has long interpreted the Supremacy Clause of Article VI of the United States Constitution as authority for the principle that the federal government is immune from state and local regulation and taxation. In the historic case of *McCulloch v Maryland*, 4 Wheat 316 (1819), Chief Justice Marshall wrote:

> ". . . the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." [4 Wheat 316, 435 (1819)]

The language of *McCulloch* certainly establishes federal government immunity from a broad range of local and state licensing and inspection laws. Yet, the immunity granted to federal agencies is not absolute.

Congress may affirmatively subject federal governmental instrumentalities and property to state and local regulation. As stated by this Court in *Mayo v United States*, 319 US 441, 446 (1943), "it lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities."[10] The doctrine of immunity as derived from the Supremacy Clause may be limited and waived by Congressional action.

A relevant example of a Congressional waiver of federal sovereign immunity is the case of *Maun v United States*, 347 F 2d 970 (9th Cir. 1965). In *Maun*, the Court of Appeals held that section 271 of the Atomic Energy Act of 1954, 42 USC 2018, required the Atomic Energy Commission to accede to any federal, state, or local regulation with respect to the generation, sale, or transmission of electric power.

Since Congress may expressly authorize federal agency compliance with state and local regulations, it is crucial to examine what duties are affirmatively imposed by Congress on federal facilities and agencies in the area of state and local regulation of pollution. This fundamental interpretive question is the focus of our attention now.

III.

UNDER THE CLEAN AIR ACT OF 1970 AND THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, CONGRESS HAS WAIVED THE IMMUNITY OF FEDERAL FACILITIES AND PLACED THEM ON A PAR WITH PRIVATE POLLUTERS IN TERMS OF COMPLIANCE WITH ALL STATE AND LOCAL POLLUTION CONTROL REQUIREMENTS INCLUDING PERMIT PROCEDURES.

The central issue of this litigation is whether federal agencies must obtain and comply with water quality control permits issued by the states under the Federal Water Pollution Control Act Amendments of 1972. [33 USC 1251, et seq.] The question of whether federal agencies must comply with the Clean Air Act of 1970, 42 USC 1857, et seq, and obtain state permits is so interrelated that we will address both questions. We hope to note relevant distinctions, however, between the air and water control programs.

A. SECTION 118 OF THE CLEAN AIR ACT OF 1970 MANDATES THAT FEDERAL AGENCIES COMPLY WITH ALL STATE AND LOCAL REQUIREMENTS RESPECTING THE CONTROL AND ABATEMENT OF AIR POLLUTION.

"(The Clean Air Act of 1970 represents) the toughest, most far-reaching environmental legislation ever enacted by Congress."

— Senator Edmund S. Muskie, as quoted in *The Boston Globe*, January 1, 1971, on page 2.

To understand the integration of federal facilities in the effort to abate pollution nationwide, a brief understanding of the Clean Air Act of 1970, 42 USC 1857 et seq, is necessary.

The Clean Air Act of 1970 places primary responsibility for air quality control at the state government level. 42 USC 1857c-2. States have the delegated duty to maintain national ambient air standards for various pollutants within their respective borders. 42 USC 1857c-5. Furthermore, each state has authority to establish more stringent air quality standards than the national standards. 42 USC 1857d-1. Air pollution abatement is thrust, therefore, directly to the states under federal law.

There is, also, substantial coordination between state air quality control efforts and the federal government. Each state, for instance, must prepare and submit to the Federal Environmental Protection Agency for approval an implementation plan which details the maintenance and enforcement of ambient air standards. 42 USC 1857c-5.

In early 1972, pursuant to the requirements of the Clean Air Act, 42 USC 1857c-5, the State of Michigan submitted a plan describing its implementation of Federal primary and secondary ambient air quality standards. The Administrator of the United States Environmental Protection Agency, reviewed this plan, known as the "Michigan Implementation Plan," and in May of 1972 timely approved it (with an exception not here relevant). The Michigan Implementation Plan adopted a control strategy to require that all uncontrolled sources of air pollution would be brought into compliance by legally enforceable compliance schedules. Once approved by the Administrator, Environmental Protection Agency, the Michigan Implementation Plan became a federal-state implementation.

Another key element for the integration of the federal government into the states' programs for air pollution abatement is Section 118 of the Clean Air Act. Section 118 provides in relevant part that:

> "Each department, agency and instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local *requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.*" [42 USC 1857f (emphasis ours)]

Thus, the program of air pollution control includes federal approval of a state program and also federal compliance with the terms of the state program; federal-state relations on air pollution control is a two-way process.

Under Michigan law, a person cannot "install, construct, reconstruct or alter any process, fuel burning, or refuse burning equipment which may be a source of an air contaminant, or control equipment pertaining thereto, before issuance of a permit by the [Michigan Air Pollution Control] Commission." Michigan Administrative Code, 1967 AACS R 336.21. Additionally, a person cannot "operate a process, fuel burning, or refuse burning equipment which may be a source of an air contaminant, nor an air cleaning device pertaining thereto, before the issuance of a permit to operate by the [Michigan Air Pollution Control] Commission." Michigan Administrative Code, 1973 AACS R 336.29. In summary, under Michigan law a person seeking to utilize a potential source of air pollution must secure two permits: a permit to install and a permit to operate.

Juxtaposing Section 118 of the Clean Air Act, 42 USC 1857f, with the requirements for abatement of pollution that any person in Michigan is subject to would clearly mandate

that any federal instrumentality operating in Michigan, which is a source of air pollution, secure an installation permit and an operating permit from the Michigan Air Pollution Control Commission.

B. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 ALSO DICTATES THAT FEDERAL AGENCIES COMPLY WITH ALL STATE AND LOCAL REQUIREMENTS RESPECTING THE CONTROL AND ABATEMENT OF WATER POLLUTION.

"No one has the right to use America's rivers and America's waterways, that belong to all the people, as a sewer. The banks of a river may belong to one man or one industry or one State, but the waters which flow between the banks should belong to all the people."

— President Lyndon Johnson, upon signing the Water Quality Act of 1965.

The Federal Water Pollution Control Act Amendments of 1972, like the Clean Air Act, but with even more force, integrates federal facilities into the state and local programs to control water pollution. This becomes clear upon examination of the Federal Water Pollution Control Act Amendments of 1972, 33 USC 1251 et seq.

Like the Federal Clean Air Act of 1970, the Federal Water Pollution Control Act of 1970 recognizes the primary responsibility for water pollution abatement at the state level. 33 USC 1251(b). The water act explicitly authorizes the states to develop and enforce a permit system to achieve compliance with the standards established in the act. 33 USC 1342(b). Furthermore, when the Administrator of the Environmental Protection Agency approves a state permit

program, the issuance of federal permits is suspended. 33 USC 1342(c). The state permit, after approval of the program, becomes a national permit.

Section 313 of the Federal Water Pollution Control Act Amendments of 1972 specifically integrates federal agencies and instrumentalities into the state permit programs; Section 313 stipulates that federal agencies and instrumentalities:

> ". . . shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements including the payment of reasonable service charges." [33 USC 1323]

This section requires that federal facilities comply with all water pollution control requirements as if they were private citizens.

Pursuant to Section 7 of Michigan's Water Resources Act, a person cannot "discharge any waste or waste effluent into the waters of [the] state unless he is in possession of a valid permit therefor from the [Michigan Water Resources] Commission." 1929 PA 245, as amended last by 1973 PA 3, being MCLA 323.7; MSA 3.527. The Michigan permit program is approved under the federal waste water discharge system, also. Regulations for participation in the National Pollutant Discharge Elimination System were approved by the Michigan Water Resources Commission on September 21, 1973. 4 *Environment Reporter* 880 (No 22, September 28, 1973). On October 18, 1973, Michigan became the fourth state to be granted permanent authority by the Environmental Protection Agency to issue National Pollutant Discharge Elimination Permits. 4 *Environment Reporter* 1115 (No 27, November 2, 1973).

A private person discharging waste into the waters of Michigan, therefore, must secure a permit from Michigan authorities pursuant to both state and federal law; federal agencies discharging waste into Michigan waters under Section 313 of the Water Pollution Act Amendments of 1972 should also secure a permit from Michigan authorities.

C. THE CRITICAL STATUTORY PHRASE, "COMPLY WITH REQUIREMENTS RESPECTING THE CONTROL AND ABATEMENT OF POLLUTION TO THE SAME EXTENT ANY PERSON IS SUBJECT TO SUCH REQUIREMENTS," SHOULD BE INTERPRETED TO INCLUDE COMPLIANCE WITH STATE AND LOCAL PERMIT PROCEDURES BY FEDERAL AGENCIES.

"All laws are promulgated for this end, that every man know his duty; and, therefore, the plainest and most obvious sense of the words is that which must be put upon them."

— Sir Thomas More, Utopia, bk 2.

The plain language of the Water Pollution Control Act Amendments of 1972 and the Clean Air Act of 1970 should govern this litigation. Two extremely eminent members of this Court have commented upon the controlling nature of the language of a statute as follows:

> "We do not inquire what the legislature meant; we only ask what the statute means."
>
> [Mr. Justice Oliver Wendell Holmes, Collected Legal Papers, 207.]

and

> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when the legislative history is doubtful do you go to the statute."
>
> [Mr. Justice Felix Frankfurter, quoted in 47 Col L Rev 527, 543 (1947).]

The federal government suggests the water act includes something more than the statutory language, however. Specifically, the federal government contends that there are two types of "requirements," procedural and substantive. The federal government further asserts that federal agencies and installations must only comply with substantive requirements and not with procedural requirements which include permit procedures. This position does not comport with the language of Section 118 of the Clean Air Act of 1970 or with Section 313 of the Water Pollution Control Act Amendments of 1972.

Both Section 118 of the Clean Air Act of 1970 and Section 313 of the Water Pollution Control Amendments of 1972 contain essentially the same telling phrase; both acts dictate that federal agencies apparently must comply with "requirements respecting control and abatement of air [water] pollution to the same extent that any person is subject to such requirements." Congress did not state that federal compliance was limited to emission standards or compliance schedules. There is nothing in the statutory language, furthermore, which suggests a distinction between substantive and procedural requirements.

The words "requirements respecting control and abatement of pollution" is all encompassing. A "requirement" is easily defined as being that which is required. Indeed, reading the phrase "to the same extent as any other person"

with the phrase "comply with requirements respecting control and abatement of pollution" compels the conclusion that Congress placed federal facilities on the same basis as private persons.

We submit, therefore, that Congress waived the immunity of federal facilities and directed them to comply with state and local pollution control requirements including permit procedures.

IV.

FEDERAL AGENCIES SHOULD NOT BE ALLOWED TO CIRCUMVENT THE PERMIT PROCESS WHICH IS THE FOUNDATION FOR AN EFFECTIVE STATE AND LOCAL POLLUTION CONTROL PROGRAM.

"The policy as well as the letter of the law is a guide to decision."

— Justice Douglas, in *Markham v Cabell*, 326 US 404, 409 (1945).

The mandate from Congress to the states is to provide the citizens of our country with clean air and water. Specifically, the instruction from Congress is to regulate all sources of pollution. Significantly, Congress waived the immunity of federal facilities and integrated federal agencies into state and local pollution control. The state and local permit is the vehicle which carries out this direction from Congress.

At the practical level, pollution abatement is often secured by the imposition of a compliance schedule for the installation of a control technology. The technology is subsequently evaluated by a monitoring program. Underlying this entire process is a state and local permit.

A permit program provides a vital information function. Permit applications, for instance, provide basic data as to what pollutants a facility will discharge or emit and where and when such emissions will occur. This is the raw information which determines the need for a compliance and monitoring program at a polluting source.

The National Council on Environmental Quality in its 1973 report, in reference to the permit system required under the Federal Water Pollution Control Act, stated:

> "Once the permit system is fully operational, it should provide a comprehensive picture of the pollution coming from point sources as well as a vital tool for reducing such pollution." [Council on Environmental Quality, *Fourth Annual Report*, 280 (1973).]

Naturally, involvement in a state or local permit program will result in some minimal inconvenience to federal agencies. The alternative, however, is entirely unacceptable. Without federal compliance to state and local permit programs, there exists no means to determine whether a federal agency has achieved technical compliance with substantive standards. Locating potential federal sources of pollution is, also, a serious problem without an inventory process that a permit program provides. The permit process insures that federal agencies comply with the laws and regulations for pollution control. If any one or more sources remains independent of a state or local control program, it may become impossible to maintain air and water quality standards. In our view, the federal government has no special license to pollute and should therefore, comply with state and local permit requirements.

CONCLUSION

The State of Michigan believes that federal facilities should be subject to state and local permit requirements because:

1) Congress waived immunity from state regulation for federal facilities, and

2) an effective nationwide pollution abatement program requires the integration of federal facilities into the state pollution control system.

Consequently, Michigan urges this Court to affirm the decision below.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Stewart H. Freeman
Assistant Attorney General

Charles Alpert
Assistant Attorney General

Environmental Protection and
Natural Resources Division
The Law Building, Suite 630
525 West Ottawa
Lansing, Michigan 48913
(517) 373-1130

DATED: September 5, 1975

FOOTNOTES

[1]
General Services Administration, *Inventory Report – Real Property Leased to the United States Throughout the World.* (June 30, 1973), p 36.

[2]
Id., pp. 16-17.

[3]
Environmental Protection Agency, Office of Air Programs, *Real Property Owned by the Federal Government in the State of Michigan* (June, 1971).

[4]
Id. The nine installations are as follows: Veterans Administration Hospital (Battle Creek), Wurtsmith Air Force Base, Selfridge Air Force Base, Detroit Arsenal and Tank Plant, Fort Custer, Keweenaw Fld. Stat., Michigan Army MSL P1, Kincheloe Air Force Base and K.I. Sawyer Air Force Base.

[5]
Zwick, David and Benstock, Mary, *Water Wasteland*, Bantam Books, Inc., (New York, 1971), p. 340.

[6]
Id.

[7]
Id.

[8]
General Services Administration, *supra* fn 1, p. iv.

[9]
Zwick, *supra* fn 5, p. 340.

[10]
See also, *Baltimore Nat Bank v State Tax Commission*, 297 US 209, 211 (1936); *Pacific Coast Dairy Inc v Dept of Agric of Calif*, 318 US 285, 296 (1943).